OMB APPROVAL NO. 43-R0525

U. S. DEPARTMENT OF JUSTICE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION	CATEGORICAL GRANT PROGRESS REPORT		
GRANTEE Studies in Justice, Inc.	LEAA GRANT NO. 75-DF-99-0054	DATE OF REPORT Mar. 28, 1979	REPORT NO. 2
IMPLEMENTING SUBGRANTEE	TYPE OF REPORT ☐ REGULAR ☐ SPECIAL REQUEST ☒ FINAL REPORT		
SHORT TITLE OF PROJECT Interchange of Counsel	GRANT AMOUNT		
REPORT IS SUBMITTED FOR THE PERIOD May 1, 1977	THROUGH December 15, 1977		
SIGNATURE OF PROJECT DIRECTOR Kenneth J. Hodson	TYPED NAME & TITLE OF PROJECT DIRECTOR Kenneth J. Hodson		

COMMENCE REPORT HERE (*Add continuation pages as required.*)

1. Extension of Project.

Reference is made to the Progress Report for the period April 1, 1975 - April 30, 1977. At the time that report was filed, the project was scheduled to end on August 31, 1977. Subsequently, the project was extended to December 15, 1977.

2. Activity.

a) Interchange Brochure: Pursuant to the request of LEAA, Studies in Justice prepared a Brochure outlining the underlying concept and objectives of the Interchange of Counsel project and its progress in meeting those objectives. The Brochure (copy attached as Appendix 1) was transmitted to LEAA on June 23, 1977.

b) American Bar Association Program. At the Annual Meeting of the American Bar Association in New York in August 1978, the Project Director presided over a program of the Criminal Justice Section which was concerned with a comparison the British and American procedures and practices in providing counsel for the prosecution and defense of criminal cases. One hundred copies of the Interchange Brochure were distributed to the speakers and the members of the audience. The panel of speakers consisted of one solicitor and two barristers from Britain, and one prosecutor, one public defender, and one member of the private criminal defense bar from the United States. Four of the speakers commented favorably on the probable value of the Interchange project in achieving increased objectivity on the part of counsel, resulting in a fairer administration of justice.

3. Project Sites.

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NOTE: *No further monies or other benefits may be paid out under this program unless this report is completed and filed as required by existing law and regulations (FMC 74-7; Omnibus Crime Control Act of 1976).*

RECEIVED BY GRANTEE STATE PLANNING AGENCY (*Official*)	DATE

a) Philadelphia. In Philadelphia, one mid-level attorney from the public defender's office and one from the Philadelphia prosecutor's office is given a leave of absence to permit him to serve on the other side of the courtroom for a six-month period. Two defenders and two prosecutors have participated in the Philadelphia program.

b. Minnesota. The Hennepin County program operates in the same way as Philadelphia. It has been operating since August 1975, however, and a total of eight lawyers had changed roles during the life of the project. Two additional lawyers entered the program prior to the end of the program, but had not completed their six-month tours by the end of the project.

c) Yuma. Yuma County, Arizona, has no public defender office, and indigent accused are represented by defense attorneys from the criminal trial bar. The Yuma County interchange project involves the appointment of those defense attorneys to serve as special prosecutors in selected criminal cases. Members of the County Attorney's staff do not, however, serve as defense counsel. During the course of the project, four lawyers were appointed to prosecute 17 cases, while continuing to serve regularly as defense counsel in the same court. Thus, of the three project sites, the Yuma project most nearly resembles the British Barrister system.

4. Evaluation.

The final evaluation report was forwarded to LEAA by DataPHASE, Inc., the independent evaluator, in September 1977. Summarized, the objectives of the Interchange program were:

(1) To increase a professionalism on the part of the criminal trial bar, both prosecution and defense.

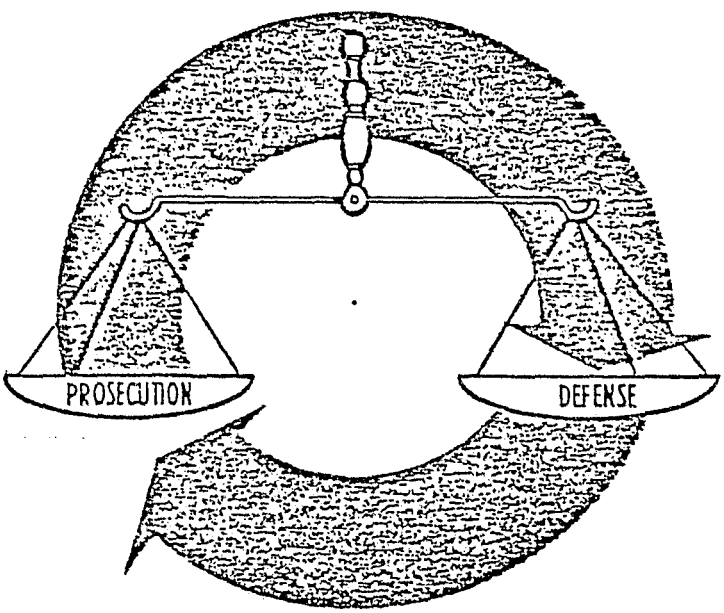
(2) To increase respect in the community and among criminal justice professionals for the criminal trial bar.

(3) To promote better relations between defense attorneys and prosecutors, resulting in a better understanding by both of the criminal justice system, which will promote a more efficient and more just system.

A study of the conclusions arrived at by DataPHASE (copy attached as Appendix 2) and a consideration of the views of the participants as reported in the Summary of the Proceedings of a conference held on April 21 - 22, 1977 (copy attached as Appendix 3) reflect that

these objectives were met, in whole or in part, at all of the project sites. All participants and the evaluator were in agreement that objective (1) was fully achieved, and that all career prosecutors and defenders should participate in an interchange-type program because of its great value as a training device.

INTERCHANGE



INTERCHANGE OF COUNSEL
IN CRIMINAL CASES

INTERCHANGE OF COUNSEL IN CRIMINAL CASES

A PROGRAM TO IMPROVE

THE

ADVERSARY SYSTEM

This pamphlet was prepared by Studies in Justice, Incorporated, 1776 F Street, N.W., Washington, D.C., 20006, the grantee for a demonstration project funded by the Law Enforcement Assistance Administration. The project was conceived and designed by Charles L. Decker to test the value of the use of the English Barrister concept in criminal justice proceedings in the United States.

This pamphlet contains a comparision of the manner in which prosecutors and defense counsel function in criminal cases in England and the United States; and it describes how the English system is being used in three jurisdictions in the United States.

June, 1977

LEAA Grant Number
75 DF - 99 - 0054

INTRODUCTION

In addition to the English language, the colonists brought the English Common Law with them when they came to the new world.

That there are differences in the English language as spoken in the United States and England is readily apparent to anyone in the United States who has watched "Upstairs - Downstairs" on Public Television, or to anyone who has visited England. In My Fair Lady, Professor Higgins comments,

> " There even are places where English completely disappears. Why, in America, they haven't spoken it in years."

A similar comment could be made about the legal systems of the two countries. In a paper prepared for the Bicentennial Observance of the American Bar Association at its annual meeting in 1976, two distinguished members of the English legal profession reported:

> ". . . although our systems have a single root in the common law, and although we as two nations are further allied by a common tongue and shared ideals, the differences between our two systems are today most marked . . .
> ". . . These differences mask our similarity of aim, to protect the innocent before and during trial, and to ensure the conviction of the guilty . . ."

Although these English commentators readily conceded that their system is not perfect, observers of the two systems have noted that England has far fewer judges and lawyers per capita than the United States, but disposes of its criminal cases far more quickly, and with greater public satisfaction.

Many factors contribute to the rapid disposition of criminal cases in England. Although more than 95% of the criminal cases in both countries are disposed of by pleas of guilty or trial by a judge

or magistrate, serious cases which are tried by a jury require far more time in the United States, both at the trial and appellate levels.

In England, for example, there are no multiple levels of appeal open to a convicted person; and the one that is provided is usually disposed of speedily by a concise oral decision of a judge of the Court of Appeal, immediately following brief arguments by counsel. An appeal will fail unless the Court concludes that a miscarriage of justice has actually occurred. If affirmed by the Court of Appeal, the conviction is final, other than for a few cases which are accepted for review by the House of Lords, and a still smaller number (five in 1975) which may be referred to the Court of Appeal by the Home Secretary.

The swift disposition of criminal appeals in England contrasts sharply with the seemingly interminable appeals and multiple petitions for post conviction relief which characterize the American system of criminal justice.

Likewise, a trial by jury of a serious criminal case in England is more quickly concluded than in the United States. A number of factors combine to produce speedy trials in England, such as the quick selection of the jury panel, less technical rules of evidence, and the full disclosure to the defense, prior to trial, of all of the prosecution's evidence. Of paramount importance, however, is the role of the counsel for the prosecution and the defense.

The Role of Counsel in the Adversary System -- In both England and the United States, a trial by jury is based essentially on an adversary system of procedure, whereby two adversaries, the prosecution and the defense, approaching the evidence from entirely different perspectives and objectives, and functioning within the framework of an orderly and established set of rules, seek to present evidence which will enable the jury to reach an impartial result on the issue of guilt. In a sense, this involves a contest between the parties, but a criminal trial is not thereby to be reduced to a test of strength between the prosecutor and the defense counsel. Although courage and zeal are the hallmarks of prosecution and defense counsel, they are to be exerted within standards of professional conduct which apply equally to both. It should be borne in mind, however, that:

" The two sides of the contest are not governed by the same rules, for the interest of the prosecution is not that it shall win the case, but that it shall bring forth the true facts surrounding the commission of the crime so that justice shall be done; whereas the role of defense counsel is not only to prevent conviction of the innocent, but to represent his client diligently and skillfully, whether he is innocent or guilty, using all legitimate forensic means to obtain an acquittal."

- - - ABA Criminal Justice Standards
Function of the Trial Judge

THE ADVERSARY SYSTEM IN ENGLAND

Although the ground rules for the adversary system are the same in England and the United States, the day-to-day functioning of the English system is different. This variance stems in part from the fact that England has no counterpart to our prosecuting attorney, who only prosecutes criminal cases, and our defense counsel, be he a public defender or a member of the criminal defense bar, who only defends criminal cases.

The Role of the Barrister -- In England, not every lawyer admitted to practice can prosecute or defend serious criminal cases. In those cases, the prosecution and defense functions are performed by barristers on a case-by-case basis. A barrister is a professional trial advocate. He may be appointed by the Director of Public Prosecutions to serve as counsel for the prosecution in one case, and, on the following day, he may accept an appointment to serve as counsel for a defendant in another case. Both cases may be tried before the same court. He is not involved with supervising or advising the police with respect to investigating the case which he is appointed to prosecute, or with formulating the specific criminal charge against the defendant. Those functions are performed by others. Nor does he generally interview the witnesses, except the defendant, when he serves as defense counsel; that task is performed by a solicitor, also a lawyer, but one who is not permitted to represent the defendant in open court. This arrangement keeps a barrister at a distance from the principals in the case and immunizes him to a large degree from emotional involvement, whether he is prosecuting or defending.

The result is described by Daniel J. Meador, a perceptive American observer of the English system:

> " Mutual trust is reinforced by the air of detachment on the part of counsel. By detachment is meant an objective, unemotional attitude toward the client and the case, an attitude which is not inconsistent with the adversary role of the advocate. Counsel in his own mind and in the minds of others is not emotionally identified

with his client. He is not representing a 'cause' nor engaged in ideological combat. Counsel is a professional retained to present the defendant's case as an advocate in the most persuasive and effective way he can. Detachment does not mean that the case is presented any less forcefully or persuasively than it would otherwise be. It does mean that the presentation is free of histrionics, irrelevant verbiage, and misplaced emotionalism. The style is in fact quite effective. The detached stance of counsel makes for a matter-of-fact, tightly organized presentation which gets to the point promptly and stays there. Minimum time is consumed."

- - - Meador - Criminal Appeals; English Practices and American Reforms

THE ADVERSARY SYSTEM IN THE UNITED STATES

The Prosecution -- In a jury trial of a serious criminal case in the United States, the prosecution counsel is a lawyer from the office of the prosecuting attorney of that jurisdiction (called, variously, District, County, or State's Attorney). He generally devotes his full time to the prosecution of defendants for crimes; he does not represent defendants in criminal cases in the same court. With respect to a particular case, he will have advised and assisted the police in conducting the investigation, marshalling the evidence, and formulating the charge upon which the defendant will be tried. It will be "his case" to win or lose.

The Defense -- The defense counsel in such a case is a public defender or a member of the criminal defense bar; he is most likely to spend all or much of his time in the defense of criminal cases; he does not prosecute cases. He will have been assigned to the case or retained by the defendant at an early stage in the proceedings. He usually spends a great deal of time with the defendant, and will probably have interviewed the witnesses. In short, he will become closely involved in the defense of the case well before the trial commences.

Trial by Ambush -- Where, as in the United States, counsel in criminal trials devote their exclusive time to one side of the case, objectivity and detachment are sometimes missing. The system tends to lead to an attitude of "win at any cost." Defense counsel becomes biased in favor of the defense; prosecutors become biased in favor of the prosecution. The courtroom becomes an arena for personal combat between counsel in which the defendant often plays a relatively insignificant part. In many jurisdictions, there is a positive effort on the part of counsel to conceal as much of his evidence as possible until it is actually presented in court, which results in a "trial by ambush", where the weapon of surprise is used to reach a result that may not be warranted by the evidence.

The Effect of Publicity -- The widespread publicity given to criminal trials in the United States -- unlike England -- tends to compound the problem, as it creates an atmosphere in which some counsel are tempted to "play it to the press" in the hope of achieving a favorable public verdict, even when the verdict of the jury is unfavorable.

The finger of blame for this unfortunate aspect of criminal trials in the United States is not to be pointed at the media; rather, it is directed at the prosecutor who adapts his trial tactics to improve his chances of re-election, or the defense counsel who is hoping to attract more clients. The public consequence is a protracted trial, with its resulting drain on the time of the court and the jury, and an increasing backlog of criminal cases on the docket.

Gamesmanship -- Of more serious consequence, it is not uncommon for the prosecution oriented prosecutor or the defense oriented defense counsel to engage in obstructive gamesmanship, and, on occasion, downright chicanery or violation of the law, in the effort to "win at any cost." Success is sought by the use of tactics which are at best, pettifoggery, and at worst, grounds for disbarment.

Actions by Prosecutors -- The decisions of appellate courts reflect cases:

- where the prosecutor withheld from the defense a confession of an accomplice that he, and not the defendant on trial, had strangled the victim;

- where the prosecutor withheld from the defense police reports which contained statements of the prosecutrix in a rape case that were inconsistent with her trial testimony;

- where the prosecutor introduced into evidence a pair of men's shorts, with reddish brown stains, referred to by the prosecutor as stained with the victim's blood, when the prosecutor knew that the stains were not blood, but brown paint.

Actions by Defense Counsel -- Appellate decisions rarely contain evidence of such unethical conduct on the part of defense counsel, for, if the defense counsel is successful in the use of such tactics, the defendant will be acquitted and there will be no appeal. Records of bar disciplinary committees, however, contain evidence of similar behavior. For example, they reflect cases:

- where a defense counsel advised prosecution witnesses that they need not be present at a trial, and then moved for an acquittal on the grounds that the witnesses failed to appear;

- where a defense counsel wrote and widely circulated a letter -- which ultimately fell into the hands of the press -- complaining of the prosecution's handling of an on-going murder trial;

- where a defense counsel entered into a fee agreement with a widow charged with murdering her husband to accept a percentage of the proceeds of a life insurance policy (which would be payable only if he gained an acquittal) thereby denying her the opportunity to seek a more lenient sentence by pleading guilty;

- where a defense counsel entered into an agreement to defend his client provided he could write a book about the case, thereby raising the question of whether his defense tactics would benefit the client or the sale of the book;

- where a defense counsel cross-examined the young victim of a brutal gang rape so ruthlessly and relentlessly about her sex life that she suffered a complete mental breakdown requiring extended psychiatric treatment.

Excessive Zeal and the Adversary System -- It should be noted that conduct of prosecutors and defense counsel of the type noted above is clearly the exception. Further, the type of cross-examination noted in the last example has now been prohibited by statute in many jurisdictions. Most lawyers, whether prosecuting

or defending, observe high standards of ethical conduct. Nevertheless, because of emotional involvement in the case, the conduct of counsel in the United States is too often marked by excessive zeal.

A defense counsel can negotiate a rational conclusion of the case for the defendant, including the disclosure of guilt-denying or guilt-minimizing evidence, if the prosecutor will reciprocate and accept a reasonable conclusion for the State. Such reasonableness is not always a normal pattern of the adversary system of the United States. In fact, one observer of the adversary system in the United States has commented:

> " I found . . . a system in which truth is incidental . . . and justice is largely accident."

and she concluded:

> " Within the adversary framework, no amount of patching, tinkering, or stopgapping will significantly ameliorate our legal ills. Only a new legal system, based on new assumptions, will do."
>
> - - - Strick, Juris Doctor, February 1977

The Adversary System - - Demise or Reform ? - - Although there is criticism of the adversary system in the United States, it works in England. Can and should we adopt the English system? The authors of the widely accepted American Bar Association's Standards for the Prosecution Function think so:

> " Many qualified observers of our system of criminal justice who have also studied the British system have commented on the importance of the professional independence enjoyed by the barrister assigned on an ad hoc basis to represent the prosecution. Since he is also likely to appear for the defense, and this system of interchange of roles has long prevailed, traditions have grown which blunt excessive zeal without impairing, and which indeed improve, the quality of advocacy. Another factor is that the British system of a bifurcated legal

profession renders the trial bar a closely knit professional community with strong traditions of internal as well as external discipline which temper flamboyant and irrational partisanship such as is so often exhibited in American courtrooms. Although our traditions diverge from the British in some respects, we also can profit by encouraging an exchange of roles."

- - - ABA Criminal Justice Standards
The Prosecution Function

Professor Meador reached the same conclusion:

" Immediate steps can be taken. . . to attempt to create working arrangments which will promote an atmosphere of detachment and candor among prosecuting and defense attorneys and will heighten their sense of professionalism. Here the English system is instructive. One of the keys to those qualities within the English bar is the fluidity of practitioners, representing both prosecution and defense. . . It is possible to experiment in the United States with arrangements which incorporate these key features, since public funds provide all the representation for the prosecution and a very large proportion of defense representation. . . The question is not whether public money should provide representation for both sides. This is established. The question goes to the best arrangement for providing counsel for both prosecution and defense to serve the overall interests of the administration of justice. Those interests include effective representation of the state and of defendants, fair and efficient conduct of proceedings, and constructive contribution to the legal process. Those interests might be furthered through an arrangement which incorporates some of the English features."

- - - Meador, Criminal Appeals; English Practices and American Reforms

THE INTERCHANGE PROJECT

Concept of the Project -- Funded by the Law Enforcement Administration, Studies In Justice, Inc., a nonprofit organization, developed a project for the interchange of counsel in criminal cases in three jurisdictions in the United States. The purpose of the project was to test the concept that such an interchange -- enabling prosecutors to defend and defense counsel to prosecute -- will improve the objectivity and competency of the participants. These improvements will result in fairer and more efficient disposition of criminal cases, particularly with respect to plea negotiations, reciprocal pretrial disclosure of evidence, and sentence recommendations. Trial by jury would be reserved for those cases in which there is a real issue of guilt or innocence, and those trials would be disposed of more quickly because only those issues which are in doubt would be litigated.

Objectives of the Project -- More specifically, the objectives of the project are:

(1) To increase professionalism on the part of the criminal trial bar, both prosecution and defense.

(2) To increase respect in the community and among criminal justice professionals for the criminal trial bar.

(3) To promote better relations between criminal defense attorneys and prosecutors, resulting in a better understanding by both of the criminal justice system, which, in turn, will promote objectivity and a more efficient and fairer system.

How the Project Operates -- During the first grant period, three projects became operational; one in Philadelphia, Pennsylvania; one in Hennepin County (Minneapolis), Minnesota, and one in Yuma, Arizona.

In Philadelphia, one mid-level attorney from the public defender's office and one from the Philadelphia prosecutor's office is given a leave of absence to permit him to serve on the other side of the courtroom for a six-month period. Two defenders and two prosecutors have participated in the Philadelphia program.

The Hennepin County project is operated in a similar fashion, except that two public defenders and two prosecutors exchange roles each six months. Eight lawyers have changed roles during the project.

Yuma County, Arizona, has no public defender office, and indigent accused are represented by defense attorneys from the criminal trial bar. The Yuma County interchange project involves the appointment of those defense attorneys to serve as special prosecutors in selected criminal cases. Members of the County Attorney's staff do not, however, serve as defense counsel. During the first year, four lawyers were appointed to prosecute 15 cases, while continuing to serve regularly as defense counsel in the same court.

EVALUATION

With the assistance of the staff at Studies In Justice, an evaluation plan has been devised and is being carried out by an independent evaluator, DataPHASE, Inc., of Park City, Utah.

An important aspect of the evaluation plan is an attempt to determine by pre- and post-exchange tests, whether there has been any change in the objectivity of participating counsel.

The final evaluation report has not been completed at this time, but the following views of interchange participants indicate some positive benefits:

All Participants --

The interchange is valuable as a continuing legal education program and should be instituted in other jurisdictions.

A defender who changed to a prosecutor --

I learned a lot about the prosecutor's problems. Being a prosecutor is not as emotionally and physically draining as being a defender. The latter has no support from the general public, from the police, from the victim, or from his family and friends, whereas the prosecutor is the man with the white hat, whether he wins or loses.

A prosecutor who changed to a defender --

I was surprised by some of the actions and attitudes of my former fellow prosecutors, particularly in the area of charging and plea negotiating; they were much tougher to deal with than I had been.

A defender who changed to a prosecutor --

Learning how the prosecutor's office works improved my effectiveness as a public defender. I learned the most about plea negotiating, which, if both sides are reasonable, is the most effective and fairest way to dispose of most cases.

A prosecutor who changed to a defender --

I was shocked by the way public defenders were treated by the other elements of the criminal justice system, namely by judges, prosecutors, private defense lawyers, and the client, as well as by the general public. They treat public defenders as second class lawyers, as necessary evils. The client will say, "I don't want a public defender. I want a real lawyer." One judge started to cite me for contempt for conduct that would have been acceptable had I been a prosecutor; when he learned that I had been a prosecutor and was to be one again, he cancelled the citation. Private defense lawyers sit in the front seats, and the judge calls their cases first. Public defenders sit behind, and their cases are called last. I am very pessimistic about the criminal justice system. I learned that a public defender has a necessary, but a hopeless, thankless job.

A defender who changed to a prosecutor --

I was treated with greater respect by judges and opposing counsel as a prosecutor than I had been as a public defender, occasionally even being addressed as "Sir!" I found that prosecutors were not interested in justice, but in winning. As a result of my experience, I think that the prosecutors and defenders should sit down and work together to formulate needed changes in the criminal law and procedure, which could be presented to the legislature and the court. The system is bad, and if we do nothing about it, it will get worse.

A prosecutor who changed to a defender --

I was readily accepted in the defender office, even though I had a reputation of being a tough prosecutor. I believe that my clients benefited from my experience as a prosecutor. I am a firm believer in the adversary system, but I had been too prosecution oriented. I found that there was very little communication between prosecutors, defenders and the police. I feel that I developed an increased objectivity in the courtroom and a different perspective toward witnesses.

A defender who changed to a prosecutor --

My clients seem to like the idea of being represented by a lawyer who also serves as a prosecutor, probably because they feel that they may get better treatment. I discovered quickly that a prosecutor has a

harder job than a defense counsel. For one thing, the defense counsel does not have to worry about committing error, whereas the prosecutor must exercise extreme caution in this regard. Thus, although you can represent both sides (in different cases) at the same time, you must be sure to remember which side you are on because of the danger of committing reversible error if you are a prosecutor.

A private defense counsel who became a special prosecutor --

We have a rule requiring disclosure to the other side of all the expected evidence in a case before trial. This provides a sound basis for plea negotiations, and the large percentage of cases are disposed of without trial. As a result of my participation, I feel that I have gained the professional respect of the police and have increased my objectivity in dealing with others involved in the criminal justice system.

SUMMARY AND CONCLUSIONS

It is too early to determine the exact benefits of the interchange project or whether the program will be adopted by other jurisdictions. Experience in the demonstration jurisdictions indicates, however, that they like it well enough to want to continue with state or local funding.

One general comment of defenders was that they enjoyed the transition to prosecutor, as there is a tendency to become frustrated when they defend cases, day-in and day-out. They know that the conviction rate is going to be well over 95%, including cases in which the client pleads guilty. In contested cases, the conviction rate is still very high. If the defense lawyer feels that he must gain an acquittal to gain satisfaction from his work, he is doomed to disappointment. The functions of a defense counsel in a criminal case are much broader than courtroom advocacy. As in other areas of the practice of law, negotiation is an important function. The defense lawyer should measure success by whether he was able to mitigate the charge or the sentence to one that is reasonable, and by whether his case was fairly heard and determined. The truth is that most defendants are convicted, even when they are represented by so-called "noted criminal lawyers". The absurdly oversimplified exploits of television and movie defense counsel has confused not only the public, but many lawyers as well. That is one of the reasons for the poor credibility of public defenders. Perry Mason and his exploits do not happen in real life. They are as mythical as Grimm's Fairy Tales.

There was general agreement among the participants -- prosecutors and defenders -- that the interchange relieved the tedium of their jobs, and gave them fresh points of view and an insight into the frailties of the criminal justice system which they otherwise would not have experienced. This observation was echoed from the other side of the Atlantic by John Mathew, a Senior Crown Counsel of the Central Criminal Court in London:

> " . . . I think it is essential, if one is to do the job of prosecuting properly and efficiently, to remind oneself by practical experience every so often what the garden looks like from the other side of the fence."

- - - 10 American Criminal Law Review 299

FUTURE DEVELOPMENTS.

The Barrister Program -- After observing the results of the interchange program, William R. Kennedy, the Chief Public Defender of Hennepin County, Minnesota, a forward-looking and innovative man, has proposed a one-year project to establish a barrister office, consisting of three attorneys from the Public Defender's Office, and three attorneys from the County Attorney's Office. This office would be separated from the regular defenders and prosecutors, and would have its own supporting personnel. Lawyers in the office would prosecute and defend cases interchangeably, depending on the caseloads of the regular offices. To avoid any possibility of a conflict of interest, however, lawyers in the barrister office would not prosecute and defend the same defendant.

In addition to the benefits resulting from the regular interchange program, the barrister office is expected to achieve a number of other goals, such as flexibility in managing the caseloads of the regular prosecutor and defense offices and a saving of administrative costs, since both defenders and prosecutors in Hennepin County are governed by the same personnel regulations, have the same pay scales, and are supported by public funds. Thus, if the concept proves workable, the future might see all prosecutors and defenders in Hennepin County in one office under the supervision of a Criminal Justice Administrator. The savings would be significant in such a case, as there would be a need for only one administrative office, one library, and one data bank of legal precedents. Further, lawyers who prosecute and defend interchangeably from a single office would have greater credibility with the police, and, hopefully, with the judges and the general public.

Impediments to the Barrister Program -- It is recognized that a barrister office such as that envisioned for Hennepin County might not work in all jurisdictions in the United States, as some have laws and regulations which prohibit a prosecutor from representing any interest adverse to the state; there are also opinions of the Ethics Committee of the American Bar Association which seem to preclude such a flexible interchanging of counsel. From the public's point of view, the barrister concept may call for a re-examination of these restrictive laws and ethical opinions, for they came into being when almost all defendants were

represented by lawyers who were not public employees. Now that most criminal cases are both prosecuted and defended by public employees, the public is entitled to get the most for its money, particularly if the system of justice is improved at the same time.

Summary -- In conclusion, the interchange program has shown positive benefits. Its expansion into the barrister office concept may be a major breakthrough in improving the adversary system in the United States. Instead of discarding the adversary system, as some critics have suggested, it would be well to determine whether it can be made to work more effectively and at less expense to the taxpayer, particularly if the rights of the accused are better protected.

Table 13

Summary Results

Study Objectives	Defense	Prosecution
1. Decrease counsel's preoccupation with and prejudice in favor of his side of profession.	• Results mixed • Trend toward decreased preoccupation and prejudice	• Results mixed • Trend toward decreased preoccupation and prejudice
2. Decrease the animosity or counsel toward counsel for the other side.	• Animosity not evident pre-interchange • No shift post-interchange	• Animosity not evident pre-interchange • No shift post-inter change
3. Increase counsel's insight into opponent's job.	• Strong increase	• Strong increase
4. Increase objectivity of counsel.	• Increase	• Increase
5. Increase pre-trial discovery.	• Increase	• Increase
6. Increase rate of cases diverted to treatment programs prior to trial.	• Initial Attitude Positive No Change	• Increase
7. Increase rate of cases terminated by plea negotiation.	• Initial Attitude Positive No Change	• Increase
8. Decrease rate of jury trials.	• No Change	• Mixed Results
9. Decrease the use of unnecessary delay tactics.	• No Change	• Mixed Results
10. Utility of using interchange concept as training for counsel.	• Very positive	• Very Positive

Table 14

Conclusions Concerning Counsel Interchange Experiment

1. Counsel Interchange appears to significantly affect six of the ten study objectives related to counsel objectivity and professional training.

2. Effect of counsel interchange seems to be greater on prosecutors than defense attorneys.

3. The data do not support the hypothesis concerning defense-prosecution animosity, since there is nominal animosity before counsel interchange.

4. The most profound effects of counsel interchange appear to be increasing counsel's understanding of opponent's job and the endorsement of interchange as a training tool.

5. Changes in performance variables (viz. cases diverted, plea negotiations, etc.) were more pronounced for prosecutors than defense attorneys.

6. Based upon the results of the evaluation, counsel interchange appears to increase counsel objectivity.

INTERCHANGE OF COUNSEL CONFERENCE
Arlington, Virginia
April 21-22, 1977

SUMMARY OF THE PROCEEDINGS

The Conference was called to order at 9:30 a.m., April 21, 1977.

Present:

Studies In Justice, Inc.
Charles L. Decker
Kenneth J. Hodson
Russell T. Boyle
Jerry R. Shelor
Patty O'Brien, Recording Secretary

Minnesota
Judge Crane Winton
John Wunsch
Paul Gilles
Bob Dolan
Stuart Mogelson

LEAA
Greg Brady (April 21)
Dave Brewster

DataPHASE
Mike Stewart

Arizona
Mike Irwin
Thomas A. Moran
Garth N. Nelson

Philadelphia
Ben Lerner
Wilhelm Knauer
Evan Silverstein
Leonard Ross
Charles Cunningham
Steve Margolin

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General Decker summarized the evolution of the Project for the Interchan of Counsel in Criminal cases (hereinafter "Interchange") and outlined its objectiv The general purpose of the project is to test the concept that interchanging couns in criminal cases - thus enabling them to gain a wider knowledge and understandi of both sides of the criminal process - will result in increased objectivity in thei attitudes and, hence, in greater effectiveness in their disposition of cases. The improved objectivity should manifest itself in increased use of discretionary procedures, such as screening, diversion, and plea negotiation, which will lead to increased efficiency in processing criminal cases. The project is also expected upgrade the overall competence of prosecutors and defense counsel. The increa efficiency and improved competence should result in speedier and fairer disposit of criminal cases, thus aiding in reducing costs and backlogs of criminal cases. The project should increase public confidence in lawyers and in the criminal justice system; it should improve relations between defenders and the police; it should help equalize the pay of prosecutors and defenders; and it should ultimatel result in the enactment of better laws and procedures for the criminal justice system.

Mike Stewart of DataPHASE summarized the experience of his company in evaluating programs similar to Interchange, and outlined the procedures followed in developing the evaluation plan. The hypothesis was developed that the greater the interchange of counsel, the greater the objectivity of counsel. The tested group is to be "normalized" by comparing it with a control group of non-participatin counsel. A basic objective is to test the amount and nature of any changes in objectivity on the part of the participants. In addition, the evaluation plan will gather data concerning certain secondary aims of the project, such as changes in the criminal justice process before and after the project in the rate of guilty pleas, the rate of jury trials, the rate of pretrial diversions, and the expansion of pretrial discovery. In preparing the final report, the data gathered will be processed through the computer and the product examined and analyzed by experienced persons

The Minnesota Experience:

Judge Winton described the Hennepin County Interchange experience. He noted that he was involved in a 1966 interchange program, lasting only three months and involving only cases tried in the municipal court. When Interchange was proposed by SIJ and William Kennedy, the Hennepin public defender, there was initial opposition by the prosecutor, who feared that he might lose personnel to the defende office. A few problems have arisen, such as the fear on the part of some clients that a former district attorney might not be effective as a defense counsel. Also, a six-month interchange is probably not enough, because the participant must divest himself of his existing case load and must pick up a new case load. The result is that the participants get to try only a few cases while they are in the program. A nine-month program would be better.

Paul Gilles reported that he had handled some 300 felony cases as a public defender in Minnesota from 1968 to 1975; that he moved to the county attorney's office for the period August 1975 to February 1976. He learned a lot about the prosecutor's problems. It was his feeling that the defense has a better grasp of each case, as defense counsel is dealing with people, whereas the prosecutor has so many administrative duties to take care of he frequently must rely on the police and investigators to interview witnesses. He found that the prosecutor must spend a lot of time convincing victims and witnesses that they must appear at the trial. Being a prosecutor is not as emotionally and physically draining as being a defender The latter has no support from the general public, from the police, from the victim or from his family and friends, whereas the prosecutor is the man with the white hat whether he wins or loses. The prosecutor's biggest personal problem is in plea negotiations, where his proposals are frequently opposed by the police and the victim.

Stuart Mogelson reported that he had served as an assistant county attorn in Minnesota before moving to the public defender's office to participate in Interchange. He found greater freedom and flexibility as a defender than as a prosecutor. He was surprised by some of the actions and attitudes of his former fellow prosecutors, particularly in the area of charging and plea negotiations. Three of the 53 cases handled by him as a public defender went to trial. He tried to settle as many without trial as possible. He would approach the cross examinatic of witnesses differently since he has been a defender. He believed that a six-mont exchange is long enough to gain experience in the other side of the criminal justic system.

Bob Dolan, a full time public defender, finished his interchange participation as a prosecutor in February 1977. All of his fellow public defenders wanted to go to the prosecutor's office to learn all the secrets in the belief that this knowledge would improve their effectiveness as public defenders or as private counse He probably learned the most about plea negotiations, which, if handled properly are the most effective and fairest way to dispose of most cases.

The Pennsylvania Experience:

Wilhelm Knauer, an Assistant District Attorney in Philadelphia, moderat the Pennsylvania presentation. He noted that Interchange in Philadelphia was uni because the prosecutor's and defender's offices were so large.

Ben Lerner, the Public Defender of Philadelphia, described the criminal justice system in Philadelphia, and noted that it had a lower percentage of guilty pleas than the nation-wide average, basically because of the policy of a former district attorney; that a high percentage of cases were disposed of by trial by judge alone; that a municipal court judge would dispose of 25 to 30 cases a day, and a common pleas judge would handle 12 to 15 cases per day; that a defender might represent 15-20 defendants per day in the municipal court, and 8-10 in the common pleas court. His reaction to Interchange was initially lukewarm, as he felt that it might have a harmful impact on the adversary system; that there was a potential for conflict of interest, particularly because of the big case load and the high percentage of recidivists. Before agreeing to the program, he received clearance from the Chief Justice of Pennsylvania and the President Judges of the Court of Common Pleas. There were early financial problems in the salary and perquisite areas, but these were resolved by continuing the participants on the payrolls of their respective home offices. Mr. Lerner concluded that the interchange benefited the individuals; that they were able to avoid the conflict pitfalls; but that it was too early for him to determine whether there was any overall benefit to the criminal justice system.

Steve Margolin, who had served in the prosecutor's office for four years, following his graduation from law school, left his position as assistant district attorney in the homicide division to participate in Interchange in April 1976. The first thing he noticed was that the prosecutors who confronted him as a defender worked hard to try to beat him because of his reputation as a prosecutor. His orientation and acceptance as a defender was quick, and he was soon working in the jury trial division. He reported that a lot of plea negotiations were going on but that they did not appear in the statistics. He was shocked at the way in which public defenders were treated by the other elements of the criminal justice system in Philadelphia, towit, the judge, the prosecutor, private defense lawyers, and the client, as well as by the general public. They treat public defenders as second class lawyers, as necessary evils. It is not unusual for the client to say, "I don't want a public defender, I want a real lawyer." Judges treat private defense lawyers with respect, but not public defenders. One of the judges started to cite him in contempt for doing the same thing that he would have done had he been a prosecutor; when the judge learned that he had been a prosecutor and would return to the prosecutor's office, he cancelled the citation. Private defense lawyers sit in the front seat and the judge calls their cases first. Public defenders sit behind, and their cases are called last. He was disappointed with the criminal justice system as a prosecutor. When he finished his six-months as a public defender, he was even more pessimistic about the system, and he has now left the practice of criminal law completely. Being a public defender is a necessary, but a hopeless, thankless job.

Leonard Ross, a public defender in Philadelphia, who moved to the district attorney's office under Interchange, tended to agree with Steve Margolin about the status of public defenders. He noted that he was treated with greater respect by judges and by opposing counsel in his role as prosecutor, occasionally even being addressed as "Sir!" He found that the prosecutor has much more control over the disposition of a case than he had thought; that the prosecutors were not interested in justice but in winning; that the defendant, to them, is not a real person, he is just a name and a number. He felt that the situation in Philadelphia is bad and is getting worse. He commended SIJ for Interchange and recommended that SIJ develop other programs in the criminal justice area in an effort to improve the system. He noted that the people in the system, particularly in Philadelphia, are so busy with case backlogs, they don't really have the time to sit down and reflect on the overall improvement of the system. Nonetheless, he suggested that the prosecutors and the defenders in Pennsylvania should sit down and work togethe to formulate needed changes in the criminal law and procedure, which they could recommend to the legislature and the court.

Charles Cunningham, an assistant district attorney who went into the public defender's office under the project, reported a favorable experience. He was readily accepted in the defender office, even though he had had a reputation as a tough prosecutor. He believed that his clients in the defender office benefited from his past experience as a prosecutor. He is a firm believer in the adversary system, but was prosecution oriented. He found that there was very little com-

munication between prosecutors, defenders, and police. Neither the defender nor the prosecutor works with the complete case in Philadelphia. They operate in separate divisions: (1) preliminary hearings, (2) misdemeanors, (3) judge alone trials, (4) jury trials. Because of this, he found that six months is not long enough to gain real insight into the life of a public defender, although he felt that he had developed an increased objectivity in the courtroom and a different perspective toward witnesses.

Evan Silverstein, a public defender for seven years who had moved to the district attorney's office reported that his experience was about the same as that of Charles Cunningham, except from the opposite point of view. The transition to the prosecutor's office was easy, but it was difficult to measure the effectiveness of a prosecutor's work because of the enormous case load and the fact that few records were kept of recividists, probationers, parolees, etc. He requested that the results of the project be distributed to everyone, and indicated that he was looking forward with anticipation to the post-project attitudinal survey.

Wilhelm Knauer stated that he had been an assistant district attorney for 10 years, and was in the Homicide Division. He has had no experience with public defenders because, in Philadelphia, they are not permitted to defend homicide cases. Indigents charged with homicide are defended by private defense lawyers, who are paid good fees. He states that Interchange gave the participants a valuable experience and probably changed the outlook and attitude of those who participated. When asked how the benefits might be passed on to other prosecutors and defense counsel in rural areas of Pennsylvania, he responded that rural counties could not afford to assign counsel to Philadelphia for six months of interchange-type training; that he and the public defender had intern training programs, involving second-year law students, which are aimed at recruiting lawyers for their offices. He stated that he cooperated with district attorneys throughout the state whenever asked. Mr. Knauer stated that it was difficult to recruit assistant prosecutors to move to the public defender's office, because there was always a risk that they might miss a promotion or a sought-after reassignment in the district attorney's office during their absence.

The Arizona Experience:

Michael Irwin, Yuma County Attorney, moderated the Arizona presentation. His office consists of five fulltime, relatively inexperienced, attorneys. The office handles many drug smuggling cases. It has a workload of about 800 felony and 800 misdemeanor cases per year. There are about 50 lawyers in the county, many of whom have served in the past as assistant district attorneys. Seven or eight local attorneys handle indigent cases, one of whom, Thomas Moran, speaks Spanish and is assigned to more cases than the others. The prosecutor's office has an open-file policy, but the proceedings are still adversary. Interchange started with six attorneys, but it quickly reduced itself to three, one of whom has handled only one case.

The Yuma project involves appointing local criminal defense lawyers as special prosecutors. Thomas Moran and Garth Nelson, who are law partners, both of whom specialize in the defense of criminal cases, have been appointed as special prosecutors in a number of cases.—

Thomas Moran noted that he was challenged in the very first case that he prosecuted on the basis that a lawyer could not prosecute and defend cases at the same time. The conflict challenge was rejected by the courts, but Chief Justice Cameron required that defense attorneys participating in Interchange must advise defendants that they are also serving as prosecutors. The clients seem to like the idea of being represented by a lawyer who also serves as a prosecutor, probably because they feel that they may get better treatment. The police and investigators also like to have criminal defense lawyers serving as prosecutors because they like the idea of being represented by experienced counsel. He discovered quickly that a defense counsel has an easier job than a prosecutor. For one thing, defense counsel does not have to worry about committing error, whereas the prosecutor must exercise caution in this regard. Mr. Moran concluded that you can represent both sides at the same time, but you must be careful to remember which side you are on, prosecution or defense, because of the danger of committing reversible error.

Garth Nelson described the full discovery practice and the tight time schedule for the disposition of criminal cases in Arizona. He also commented on the Omnibus Hearing Practice and the fact that the defense must disclose the witnesses it intends to call at the trial or be precluded from using those witnesses. The full discovery and the Omnibus Hearing provides a sound basis for plea negotiations, and the large percentage of cases are disposed of without trial. He feels that these dispositions are fair to all concerned. As a special prosecutor, he is assigned the case after initial screening by the County Attorney. As the result of participating in the program, he feels that he has gained the professional respect of the police and believes that he has improved his objectivity in dealing with others involved in the criminal justice system. The presiding judge does not object to the program, but he feels that there is no advantage to the program.

Michael Irwin advised that the principal problem encountered had been the fear that the identity of confidential informants might have to be disclosed to people who normally defend cases, but this problem has been avoided by the careful selection of cases that go to the special prosecutors. He feels that they have achieved good public relations and that the public has received the program favorably. One benefit of the program is that his relatively inexperienced assistant prosecutors can see experienced prosecutors at work.

LEAA Comments:

Greg Brady of LEAA commented that he is enthusiastic about the Intercha program. He then outlined briefly a number of other programs now being sponsor by LEAA, such as the Career Criminal Program, the National Defender College, National Prosecutor's College, the study of plea bargaining, the Economic Crime project, and the Technical Assistance programs for the courts, prosecutors, and defenders. He mentioned the recent amendment of the LEAA act which insures th the courts (including prosecution and defense) have an adequate share of block gra funds.

The conference recessed until 9:15 a.m.; April 22, 1977

Evaluation Report:

Mike Stewart of DataPHASE reported on the results of the evaluation thus far, reserving until completion of the project any comment on the attitudinal survey in order not to contaminate future tests. Although not conclusive, the results thus far tend to support the hypothesis, viz., that interchange of counsel promote objectivity. The results also tend to support the validity of the evaluation plan. Additional participants need to be tested and compared with the control group before significant conclusions can be drawn. Further, it would help the evaluation plan if the period of interchange could be extended to nine months. He hopes that the second year of funding will add other jurisdictions so that there can be an increase in the number of participants and a wider geographic spread.

Hennepin County Barrister Project

Bob Dolan discussed the legal aspects of the proposal for a barrister pro ject in Hennepin County. The plan is for four prosecutors and four public defende plus clerical and investigator personnel, to be set up in a separate offite. They would be assigned cases to defend and to prosecute on a regular, rotating basis. They would be representing some defendants and prosecuting other defendants at the same time. The English barrister system would not be followed to the letter, as solicitors would not be available to prepare cases for trial. The program is designed to increase the efficiency and objectivity of counsel; it should also decre boredom and increase freshness. There will be some conflict problems, but the can be avoided by the careful assignment of cases. Similarly, problems with con fidential informants can be avoided by assigning such cases to regular prosecutor They must educate the police and the public as to the propriety of the program, a each attorney must always remember whether he is prosecuting or defending. T is nothing novel about an attorney representing a plaintiff or a defendant in a civil case; there should be no difference in a criminal case.

John Wunsch, the administrative officer of the Hennepin County Defender office, outlined some of the administrative problems that will be solved, and suggested that the program's basic advantage is that it will provide flexibility in handling the workloads of the two offices. It might also show that one administrative office can handle both prosecutors and defenders of a jurisdiction at a considerable savings in manpower and money, particularly as in Hennepin County, where both offices are funded by the county and follow the same personnel regulation.

Both Mr. Dolan and Mr. Wunsch, as well as Judge Winton, noted that the police and the public would have to be educated about the program. They suggested that the credibility of lawyers would be improved if the public learns that a good lawyer can prosecute or defend.

Conclusions:

The conferees then discussed in general terms the various aspects of Interchange. The police, initially, and the courts are skeptical of the value of the program. An education program is necessary for the courts, the police, and the public; clients generally reacted favorably to being represented by a defender who had been a prosecutor. One unexpected advantage of the program was the improved credibility of the public defender when he appeared in court as a prosecutor. Private defense counsel and members of the bar generally are favorably inclined toward the project.

Individuals participating in the program benefit greatly from their experience This experience has both short term and long term benefits. Prosecutors tend become more objective and more human in their treatment of offenders. Defenders probably benefit the most from the program as they learn how prosecutors work and think. It would be beneficial to the criminal justice system if all prosecutors and defense counsel could participate in the program.

The program has no apparent impact on pretrial discovery, as Philadelphia has a limited discovery by policy, which has not broadened as a result of the program, and Hennepin and Yuma had open-book discovery before the program started. It has improved plea bargaining generally (even in Philadelphia, which has had a policy against plea bargaining), in that the participants are more tolerant of the views of the other side; whether this benefit will be longlasting is not known. In general terms, Yuma and Minnesota benefited more from the program than Philadelphia, because the turnover of personnel in the prosecutor and defender offices in Philadelphia is so great and the workload is so pressing that success would be difficult for any program which is aimed at improving Philadelphia's system. (In this connection, it should be noted that prosecutors and defenders in Philadelphia generally do not handle the same case from the beginning to the end; each person performs a specified function, such as serving at a preliminary hearing, and then passes the case (offender) to a fellow prosecutor or defender for further processing.

Judge Winton and General Decker summed up by suggesting that the program was beneficial as a continuing legal education program for the participants. They agreed, also, that there was a need for educating the public, the courts, the bar, and the police about the program. Judge Winton believes that the barrister program devised by Hennepin County should be of even greater benefit than the first-year Interchange programs.

The conference adjourned at 12:00 noon, April 22, 1977.

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